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Supreme Court of the United States.

October Term, 1936.

No. 667.

Anniston Manufacturing Company,

Petitioner,

v.

Harwell G. Davis, Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT THEREOF.

EDWARD R. HALE,
BENNETT SANDERSON,
Amici Curiae.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1936.

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ANNISTON MANUFACTURING COMPANY, *Petitioner*,

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully move this Honorable Court for leave to file a brief as amici curiae in the above-entitled suit. The Solicitor General and Counsel for the petitioner have assented in writing as indicated by letters filed with the Clerk of Court.

Respectfully submitted,

EDWARD R. HALE,
BENNETT SANDERSON.

Supreme Court of the United States.

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ANNISTON MANUFACTURING COMPANY, *Petitioner*,

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HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief is filed by Edward R. Hale and Bennett Sanderson as *amici curiae* on behalf of the Receivers of Hoosac Mills Corporation and Quissett Mill, both of whom have similar claims pending before the Circuit Court of Appeals for the First Circuit.

The statute involved is Title VII of the Revenue Act of 1936. That is the part of the Act which imposes restrictions upon obtaining refunds of certain taxes illegally collected. The taxes involved are floor stocks and processing taxes collected by the defendant collectors of internal revenue under the invalid Agricultural Adjustment Act.

The gist of the complaint is this: The money taken under the invalid law belongs to the plaintiff mills without any ifs, ands or buts. The statute prevents the mills from getting their money unless they can prove facts which have nothing to do with their right to get back their property. That without more is a wrong, morally, and under the Fifth Amendment. But the statute goes further. As part of the plan to enable the government to retain property illegally taken, it attempts to prevent any recovery whatsoever from the collectors who were liable for these unlawful collections when they collected them. That is a taking of the vested property right of the mills in their causes of action.

We have stated that the new facts the mills are required to prove have nothing to do with their right to get their money. This is apparent upon an examination of the statute. Boiled down to simplest terms the mills are required under section 902 to prove that they did not shift the *burden* of the tax to any one else. Of course, they must prove that they paid the tax. That they are ready to prove and for the present purposes it is assumed to be proved. But what conceivable connection with the mills' right to get back the money paid is there in this requirement of the Revenue Act of 1936 that the mills must show what happened to the *burden* of the tax in the entire course of their dealings with sellers, with labor, with other tax authorities, with purchasers and many others? It comes very close to a requirement that the mills prove that their profits have been no higher than the rate Congress sees fit to designate. If this condition is valid, a taxpayer may be required by some future enactment to show that he has made no profit before he can get back an erroneous overpayment of income tax. If it is valid, a prescribed schedule of wages and prices may be made the condition of recovering any payment of an unlawful exaction.

Who finally bore the burden of any tax or any other item of cost is an abstruse economic problem which no human ingenuity can solve. Apart from the fact that it has nothing to do with the right to refund and in plain language is none of the government's business, it is most unreasonable to make the plaintiffs' undoubted legal and moral right depend on their ability to prove a proposition so intangible and illusory that it is not susceptible of legal proof.

The Fifth Amendment protects the people from seizure and confiscation of their property except upon the orderly determination of legal rights. Seizure and confiscation without right are permitted if possession may be obtained only upon proof of an unrelated fact interjected after the property has been illegally taken. The Fifth Amendment protects the people against arbitrary and unreasonable enactments. Arbitrary and unreasonable enactments are permitted if one may have his own property only upon strict proof of something which is definitely in the realm of speculation and is incapable of exact proof.

The enormous wrongs involved in the propositions just stated are so apparent that Congress has attempted to befog the issue and lend apparent but specious validity to its outright violation of legal and moral rights by making its action appear to be a valid exercise of its subsidiary and incidental powers. Knowing that the right to prescribe the mechanics of refund was well established, Congress has tried to make this deprivation of rights appear to be merely a change in such mechanics. The subterfuge has not been unsuccessful. The attention of the lower courts which have upheld this legislation has been directed away from the effect and implications of Title VII as a whole. They have been led to affirm the subsidiary details of the legislative scheme without full consideration of the fact that, under the peculiar circumstances, the affirming

of the details permitted the more inclusive and more fundamental violation of natural and legal rights.

Another of the legislative devices designed to make effective the unlawful scheme of Title VII is the attempt to destroy the liability of the collectors set out in section 910. Equally with the other means employed to effect the unconstitutional purpose this provision must be expunged as an integral part of Title VII. The mills had a right of action against the collectors fully vested before Title VII became law. If the right of action was at common law, as it undoubtedly was in origin, it was one of the inalienable rights of the people which Congress is not free to destroy. If the right existed under statutes, it was one of the necessary conditions under the Fifth Amendment to the validity of the exaction, a full and adequate remedy for illegality either in the exaction itself or in the acts of the collectors making the exaction. Whichever the remedy was, Title VII takes it away without preserving even the substance of it. The new remedy held out as a substitute is not the same remedy; in most cases it is not any remedy at all, but only a remedy for the limited group who may be able to prove the new and immaterial facts required to be proved under Title VII. The destruction, after an exaction has been collected, of the remedy for illegal and unconstitutional exactions can hardly be valid unless an exaction wherein no provision was made for the correction of illegality or unconstitutionality would have been valid in the first instance. The guarantee of due process should not be any less under the protection of the court after the illegal taking than before the taking occurred.

This issue is far beyond and above any question of whether the right to sue a collector is a common-law right or a statutory right. Whatever the right against the collectors and whatever the right against the United States,

the plaintiffs had a property right and one or more adequate ways to enforce it upon its own merits against either the collector or the United States prior to the enactment of Title VII (or section 21(d) of the Agricultural Adjustment Act). If Title VII is valid, the plaintiffs now have no adequate way to assert their rights against any one upon the merits. If they have any remedy at all, it is upon the condition that they prove an elusive proposition of fact made necessary by laws passed since their rights arose, and having nothing to do with the liability of the defendants. It is the enactment as a whole which destroys the right. It is the enactment as a whole which must be declared invalid if the Fifth Amendment is to be kept effective.

The necessary result of wiping out the whole scheme of Title VII is to leave the pre-existing remedies in effect. They remain in effect for other forms of taxation. They are not repealed *in toto*. There is no new or other general scheme for obtaining refunds. The procedure which has been in effect for many years is still the procedure of refund except as it is varied directly or by implication by the provisions of Title VII in this one limited group of cases arising from the invalidation of the Agricultural Adjustment Act. Except for Title VII, these older internal revenue remedies under Revised Statutes, sections 3226, 3228 (26 U.S.C.A. 1672-3, 1433), are the remedies prescribed by section 19 of the Agricultural Adjustment Act for the recovery of floor stocks and processing taxes.

The plaintiffs made their claims under the old procedure as the procedure prescribed when the claims were made. Since section 21(d) of the Agricultural Adjustment Act and Title VII of the Revenue Act of 1936 appear to be clearly invalid and no more than successive hurdles wantonly cast in the way of taxpayers seeking their own property, the plaintiffs have continued to assert their

rights under the original procedure. There is no question about their full and complete compliance with the procedure which was originally prescribed and which is still the procedure prescribed if Title VII is invalid.

For the preservation of constitutional rights the single purpose and effect of Title VII must never be forgotten. Title VII as a whole is a scheme to legalize the illegal taking of property, and the provisions expunging the liability of collectors and requiring new claims for refund, proof as to the economic incidence of the tax, and administrative instead of judicial hearings, are but means to accomplish the scheme. The single purpose is so clear that the subsidiary means must fall as one with the invalid scheme.

The demurrers should be overruled.

Respectfully submitted,

EDWARD R. HALE,
BENNETT SANDERSON,
Amici Curiae.